FILED
NOV 24 1967
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 778, 779, , ,

BALTIMORE & OHIO RAILROAD CO., ET AL.
Appellants,

v.

UNITED STATES, ET AL.,
Appellees,

AND CONSOLIDATED PROCEEDINGS.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM

Submitted by
STATE OF CONNECTICUT

COMMONWEALTH OF MASSACHUSETTS

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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The State of Connecticut, the Commonwealth of Massachusetts and the State of Rhode Island and Providence Plantations, respectfully request the Supreme Court to affirm the Order of the Court below. We request the Supreme Court to require no further stay of the Interstate Commerce Commission Order which authorizes consummation of the merger of the Pennsylvania and New York Central Railroads.

In support of this motion, which is filed pursuant to Paragraph 1(c) and 1(d) of Rule 16 of the Rules of this Court, we submit the following.

I. THE NEW HAVEN RAILROAD AND ECONOMY OF NORTHEAST UNITED STATES.

In 1966, the New Haven Railroad carried 20 million tons of freight within its service area, which includes every major

city in Connecticut, in Rhode Island, in Southern and Eastern Massachusetts, as well as New York City and vicinity. This is the only railroad that provides both passenger and freight service within Connecticut, Rhode Island and major portions of Massachusetts, and between New York City and Southern New England.

The New Haven Railroad service area includes major defense industries which furnish substantial proportions of the nation's airplane and helicopter engine production and related components; nuclear submarines; rifles and other weapons (including the only producer of the M-16 Rifle, which is the prime weapon used by American soldiers in the Vietnam conflict); electronic and computer manufacturers; Department of Defense stockpiles of strategic materials; and a large number of related industries that serve the major defense material producers located in this strategic area of the nation.

New Haven's freight business produced revenues of 66 million dollars in 1966. Even temporary cessation of this indispensable service would have an immediate and incalculable adverse effect on the nation's defense effort and a catastrophic effect on the economy of our area.

In 1966, the New Haven carried 24 million passengers, including thousands of daily commuters who are completely dependent upon New Haven service for transportation to and from the metropolitan centers of New York City and Boston. Even temporary cessation of this indispensable service would leave these commuters with no practical alternate means of transportation. Highways in these areas are already overtaxed during peak commuting hours, and the addition of more vehicles during these periods of the day, whether buses or private automobiles, would result in massive traffic jams, as occurred during the two-week New York City subway strike of January, 1966. Even if highways could accommodate additional vehicles, neither the New York nor the Boston metro-

politan areas have the capacity for parking these additional vehicles.

In 1966, New Haven passenger business produced almost 38 million dollars in revenues, plus 6 million dollars in cash support furnished by the states served by this bankrupt railroad. Despite this state assistance, in 1966, the New Haven Railroad sustained a deficit of $11,345,000, and despite continuing 1967 state assistance, this Railroad's deficit for the first nine months of 1967 has already reached $17,190,000.

But even more urgent than this ever increasing deficit is the cash position of this railroad. While the deficit is computed after taking into account many expenses that do not require immediate cash outlay, such as depreciation and deferred interest obligations, no enterprise can continue operations without sufficient cash to meet its payrolls and other non-deferrable expenses.

New Haven Railroad operations are now within thirty days of complete shutdown due to the continuing attrition of available cash resources. The N.H. Trustees anticipate that in January 1968 they will have insufficient cash to meet their 1.5 million dollar weekly payroll requirement.

As pointed out by the Court below, no party disputes the conclusion that:

> "* * * early consummation of the merger not only will benefit the New Haven but is necessary to its survival. * * * that road's condition has become far graver than when this case was last before us or the Supreme Court." (Page B-15, Appendix B, Jurisdictional Statement of Baltimore & Ohio Railroad, Et al.)

The Court below stated further on Page B-29:

"What is urgent to avoid cessation of NH's vital service

are (1) early consummation of the Penn-Central merger and (2) a Commission order prescribing some form of financial aid that will permit the NH's operations to continue beyond December 31, 1967, when, as the NH Trustees now advise, their cash available for operations will be exhausted. The Commission has given every indication of its intention to do precisely that."

On Page B-70, the Court summarizes the New Haven crisis as follows:

"No one has contested the forecast of the NH Trustees that their cash will run out at the end of 1967; no one has indicated any probable source of funds for that beleaguered property other than the merged Penn-Central. * * * For our part we are unwilling to take responsibility for such devastating hardship as even a temporary cessation of NH's operations would bring to New England and New York and in a lesser degree to other sections of the country when in our view there is no reason why the merger should not proceed * * *."

The State of Connecticut, the Commonwealth of Massachusetts and the State of Rhode Island and Providence Plantations, point out to the Supreme Court that the earliest possible consummation of the Penn-Central merger is urgently required by the public interest because this merger is the only practical method available to preserve essential New Haven Railroad services.

II. NEW HAVEN RAILROAD AND PENN-CENTRAL MERGER.

Other parties argue that the New Haven Railroad crisis should not be the sole basis for authorizing consummation of the Penn-Central merger, and the States and the Federal Government should have taken necessary steps to preserve

the essential New Haven services. The fact remains that the Federal Government has not acted, and the States do not have the constitutional power to take over an interstate service.

We do not contend that the urgent New Haven Railroad crisis should be the only basis for favorable action by this Court in authorizing immediate consummation of the Penn-Central merger.

In the *Baltimore & Ohio Railroad Co. et al., v. United States, et al.* decision 386 U.S. 372 (1967), the Supreme Court reversed and remanded to the Interstate Commerce Commission for appropriate action, the Commission order authorizing the Penn-Central merger. We submit that the Commission has corrected all deficiencies which were the basis for this remand, as outlined in detail in the decision of the Court below.

But now that we are before the Supreme Court for the second time within a period of less than one year, and now that we stand at the brink of total collapse of an essential public transportation system, we emphasize that immediate consummation of the Penn-Central merger and implementation of the Interstate Commerce Commission directive to the merged company to support the New Haven, is the only feasible method of preserving this indispensable public transportation system.

III. CONSOLIDATION OF PENN-CENTRAL MERGER AND NORFOLK AND WESTERN INCLUSION CASE.

Although the Supreme Court is hearing these interrelated matters on a consolidated record, we ask the Court not to delay its decision in the Penn-Central merger case while considering the Norfolk and Western inclusion case. For reasons outlined herein, even a short delay in authorizing consummation of the Penn-Central merger will have a disastrous effect upon both the nation's defense program and the economy of Eastern United States.

Thus, while we take no position on the inclusion case and we limit our participation in these consolidated proceedings to seek expeditous approval of the Penn-Central merger, we submit that it would be in the public interest for the Supreme Court to issue separate decisions, if necessary, in order to avoid the disastrous adverse effect of further delays in the Penn-Central merger.

IV. INTERSTATE COMMERCE COMMISSION INTERIM LEASE OR SUPPORT PLAN.

In recognition of the unprecedented nature of the New Haven Railroad crisis, the Interstate Commerce Commission has undertaken the extraordinary procedure of holding proceedings on an interim support or leasing plan, under which the Penn-Central merged company would undertake the responsibility for continuing New Haven service immediately upon consummation of their merger. As set forth in Interstate Commerce Commission directives, consummation of the merger would constitute irrevocable consent by the merging companies to the interim support or lease plan promulgated by the Commission.

The State of Connecticut, the Commonwealth of Massachusetts and the State of Rhode Island and the Providence Plantations, are confident that the support or leasing order of the Commission will insure the continuation of the essential public transportation services operated by the New Haven Railroad, and for this reason, we submit that any further delay in the Penn-Central merger, as requested by New Haven Railroad bondholders, *inter alia*, would be wholly adverse to the vital interests of our States and of the United States.

V. FEDERAL TRANSPORTATION POLICY.

As pointed out by Justice Fortas in his dissenting opinion in *Baltimore and Ohio Railroad Co., et al., v. United States* (18 L. ed 2nd, 159 at 211):

"For more than 45 years it has been the national policy, reflected in congressional legislation, that the railroads of this country should be combined into a limited number of systems."

While the Federal policy with respect to consolidating our national railroad system for the purpose of eliminating unwarranted and uneconomical duplication of rail services, has been clearly set forth, we are lacking a Federal policy and a Federal program to cope with problems of financially distressed interstate railroads that provide indispensable public service. Thus, we are compelled to rely on this long delayed Penn-Central merger as the only practical method of dealing with this unprecedented and extremely urgent interstate transportation crisis.

The issue before this Court is the survival of the New Haven Railroad and the survival of our national rail system as a free enterprise industry.

As Justice Fortas emphasized at 18 L. ed 2nd, 159 at 218, delay in implementing Interstate Commerce Commission orders authorizing railroad mergers means that:

"* * * national policy continues unfulfilled; urgent national needs for improved long-haul and local rail service are impeded; the desperate erosion of the New Haven continues at a rapid pace; and the public and communities urgently in need of improved rail service continue to suffer."

VI. CONCLUSION

The State of Connecticut, the Commonwealth of Massachusetts and the State of Rhode Island and Providence Plantations, respectfully submit that the questions presented by the appellants in this proceeding are unsubstantial and warrant

no further stay of enforcement of the order of the Interstate Commerce Commission.

We submit that the urgent public interest in preserving indispensable rail services requires affirmation of the judgment of the District Court.

We ask the Supreme Court to deny all requests for further delay of the Interstate Commerce Commission order which authorizes consummation of the merger of the Pennsylvania and New York Central Railroads.

Respectfully submitted,

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DATED: NOVEMBER 24, 1967